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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 EMMANUEL WIMER,

12 Plaintiff,

13 vs.

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15 SAN DIEGO METROPOLITAN TRANSIT
16 SYSTEM et al.,

17 Defendants.
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CASE NO. 15cv413-LAB (KSC)

**ORDER GRANTING SAN DIEGO
METROPOLITAN TRANSIT SYSTEM'S
MOTION TO DISMISS WIMER'S SIXTH
AND NINTH CAUSES OF ACTION
AGAINST IT (DOCKET NO. 4) AND
ALAMILLO'S MOTION TO DISMISS
WIMER'S FIFTH, SIXTH, SEVENTH,
EIGHTH, AND NINTH CAUSES OF
ACTION AGAINST HER (DOCKET NO.
13)**

19 This case arises out of an alleged altercation between Juan A. Delgado, Patricia
20 Alamillo, and Emmanuel Wimer. Wimer alleges that Delgado and Alamillo are transit
21 officers with the San Diego Metropolitan Transit System (MTS) and Universal Protection
22 Service G.P. (UPS), and that they were acting within the scope of their employment with
23 MTS and UPS at the time of the incident. Wimer sued Delgado, Alamillo, MTS, UPS, and
24 the City of San Diego. MTS has moved to dismiss Wimer's sixth and ninth causes of action
25 under the California Government Claims Act (CGCA) for failure to file a government claim.
26 (Docket no. 4.) Alamillo has moved to dismiss Wimer's fifth, sixth, seventh, eighth, and ninth
27 causes of action for the same reason. (Docket no. 13.)

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1 **I. Discussion**

2 **A. Legal Standard**

3 A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency
 4 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The Court must accept
 5 all factual allegations as true and construe them in the light most favorable to Wimer. *Cedars*
 6 *Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007).
 7 To defeat the motions to dismiss, Wimer's factual allegations need not be detailed, but they
 8 must be sufficient to "raise a right to relief above the speculative level" *Bell Atl. Corp.*
 9 *v. Twombly*, 550 U.S. 544, 555 (2007).

10 **B. CGCA Compliance**

11 Under the CGCA, before suing a public entity or public employee for money or
 12 damages, a plaintiff must first file a claim with the public entity. See *State of CA v. Super.*
 13 *Ct. (Bodde)*, 32 Cal. 4th 1234, 1240–44 (2004); see also *Karim-Panahi v. Los Angeles Police*
 14 *Dep't*, 839 F.2d 621, 627 (9th Cir. 1988). Compliance with the CGCA is an element of a
 15 cause of action against a public entity or a public employee acting in the scope of
 16 employment. *Alcay v. City of Visalia*, 2013 WL 3244812, at *6 (E.D. Cal. June 26, 2013).
 17 A plaintiff's complaint "must allege facts demonstrating or excusing compliance with the
 18 claim presentation requirement." *Id.* at 1243. Wimer doesn't oppose MTS' motion. In his
 19 opposition to Alamillo's motion, Wimer contends that Alamillo isn't an MTS employee. But
 20 this contradicts his complaint, where he alleged that Alamillo was employed by both MTS
 21 and UPS. (Docket no. 1 at ¶ 9.) "[T]he Court's analysis focuses on the actual allegations of
 22 the . . . [c]omplaint." *In re Apple iPhone Antitrust Litig.*, 2013 WL 4425720, at *12 (N.D. Cal.
 23 Aug. 15, 2013). Thus, because the complaint doesn't allege CGCA compliance, the motions
 24 to dismiss (Docket nos. 4 and 13) are **GRANTED WITH LEAVE TO AMEND**.

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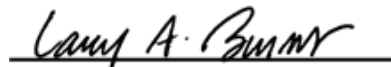
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1 If Wimer thinks he can successfully amend his complaint, he must seek leave by ex
2 *parte* motion no later than January 11, 2016. His proposed amended complaint must be
3 attached as an exhibit to the motion. If he files such a motion, MTS and Alamillo shall have
4 until January 25, 2016 to oppose it. No reply should be filed unless leave is obtained in
5 advance.

6 **IT IS SO ORDERED.**

7 DATED: December 21, 2015

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9 **HONORABLE LARRY ALAN BURNS**
10 United States District Judge
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